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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

In Re:) Case No. 08cv0713 JAH (WMc)
FRANCIS J. LOPEZ,) Bankruptcy No. 05-05926-PB7
Debtor.)
APPELLEE'S BRIEF

FRANCIS J. LOPEZ,) Hearing: September 15, 2008
Appellant,) Time: 2:30 p.m.
v.) Department: Courtroom 11
ALAN STANLY,) Judge: Hon. John A. Houston
Appellee.)

Appellee Alan Stanly ("Stanly"), respectfully submits his Appellee's Brief in opposition and response to the Appellant's Opening Brief submitted by Appellant Francis J. Lopez ("Lopez").

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TABLE OF CONTENTS

1	I.	INTRODUCTION	1
2	II.	BASIS OF APPELLATE JURISDICTION	2
3	III.	ISSUES PRESENTED	2
4	IV.	STANDARDS OF REVIEW	3
5	A.	The Bankruptcy Court's Factual Findings Are Reviewed Under the <i>Clearly Erroneous</i> Standard.	3
6	B.	The Bankruptcy Court's Decision to Order the Terminating Sanction is Reviewed Under the Deferential <i>Abuse of Discretion</i> Standard	4
7	V.	STATEMENT OF THE CASE/FACTUAL & PROCEDURAL BACKGROUND ..	4
8	A.	Filing of the Involuntary Petition and Lopez's First Motion to Dismiss	4
9	B.	Lopez Has the Case Bifurcated	5
10	C.	Lopez's Second Motion to Dismiss	5
11	D.	The Prosecution and Conclusion of Phase I	6
12	E.	Lopez Hindered, Delayed and Ultimately Refused to Provide Adequate Responses to Written Discovery Despite Multiple Orders and Admonishments from the Bankruptcy Court	7
13	F.	Lopez Continued His Delay Tactics in Connection with His Deposition	10
14	G.	Despite The Bankruptcy Court's Explicit Warnings that Terminating Sanctions May be Issued if Lopez Failed to Pay the Monetary Sanctions, Lopez Failed to Pay Any Portion of the Monetary Sanctions	12
15	VI.	DISCUSSION	14
16	A.	FRCP 37 Empowered the Bankruptcy Court to Strike Lopez's Answer	14
17	B.	Given Lopez's Egregious Misconduct and Prior Violations, the Terminating Sanction Was Within the Acceptable Range of Available Sanctions Pursuant to FRCP 37(b)	15
18	(1)	The Public's Interest in Expeditious Resolution of Litigation; and	
19	(2)	The Court's Need to Manage its Dockets	16
20	(3)	The Risk of Prejudice to the Party Seeking Sanctions	18
21	(4)	The Public Policy Favoring Disposition of Cases on Their Merits ..	20
22	(5)	The Availability of less Drastic Sanctions	20
23	VII.	CONCLUSION	23

TABLE OF AUTHORITIES

FEDERAL CASES

3	<i>Anheuser-Busch, Inc. v. Natural Beverage Distrib.,</i> 69 F.3d 337 (9th Cir. 1995)	22
4	<i>Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.</i> , 602 F.2d 1062 (2 nd Cir. 1979)	16
5	<i>De Falco v. Oak Lawn Public Library</i> , 25 Fed.Appx. 455 (7th Cir. 2001)	14
6	<i>Estrada v. Speno & Cohen</i> , 49 Fed. R. Serv.3d 50 (9th Cir. 2001)	1, 4, 15, 18
7	<i>Exxon Co. v. Sofec Inc.</i> , 54 F.3d 570 (9th Cir. 1995)	3
8	<i>G-K Properties v. Redevelopment Agency of San Jose</i> , 577 F.2d 645 (9th Cir. 1978)	17, 19
9	<i>Halaco Engineering Co. v. Costle</i> , 843 F.2d 376 (9th Cir. 1988)	3, 4
10	<i>Hayes v. Woodford</i> , 301 F.3d 1054 (9th Cir. 2002)	3, 20
11	<i>Malone v. United States Postal Service</i> , 833 F.2d 128 (9th Cir. 1987)	4
12	<i>Marx v. Loral Corp.</i> , 87 F.3d 1049 (9th Cir. 1996)	4
13	<i>National Hockey League v. Metropolitan Hockey Club, Inc.</i> , 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)	17
14	<i>Rice, In re</i> , 14 B.R. 843 (9th Cir.BAP 1981)	14
15	<i>Security Farms v. International Broth. of Teamsters, Chauffers, Warehousemen & Helpers</i> , 124 F.3d 999 (9th Cir. 1997)	3
16	<i>Valley Eng'rs v. Electric Eng'g Co.</i> , 158 F.3d 1051 (9th Cir. 1998)	15, 16, 20
17	<i>Visioneering Const., Matter of</i> , 661 F.2d 119 (9th Cir. 1981)	14
18	<i>Williams, In re</i> , 215 B.R. 289 (Dist. Ct. D.R.I. 1997)	14
19	<i>Wyle v. R.J. Reynolds Industries, Inc.</i> , 709 F.2d 585 (9th Cir. 1983)	14
20	///	
21	///	
22	///	
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08cv0713
E'S BRIEF

FEDERAL STATUTES

2	11 U.S.C. § 362(a)	19
3	11 U.S.C. § 502(f)	19
4	11 U.S.C. § 507(a)	19
5	28 U.S.C. §158(a)(1)	2
6	FRCP 1	16
7	FRCP 37(b)	2, 3, 14, 15
8	FRBP 1001	16
9	FRBP 9014(c)	2, 14

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'S BRIEF

I. INTRODUCTION

2 “Unfortunately, it is well-known in litigation circles that an oft-employed strategy is to
3 force delay, hoping to wear out the opponent financially or emotionally.”¹ That was Lopez’s
4 strategy from the outset, and he succeeded in delaying the inevitable Order for Relief for over *two*
5 *and a half years* — from June 30, 2005, when the Involuntary Petition was filed, until January 28,
6 2008, when the Order for Relief was entered. He accomplished that delay by first bifurcating the
7 case, and after his defense in Phase I failed, refusing to cooperate with discovery demands that
8 followed. He would feign cooperation with false promises, and then, at the last minute, proffer
9 some excuse as to why he could not comply. His shenanigans forced Petitioning Creditors to have
10 to continually seek the Bankruptcy Court’s assistance.

The Bankruptcy Court granted all of Petitioning Creditors' Motions to Compel discovery, and imposed on Lopez a variety of sanctions and admonishments in an effort to impress upon him the importance of his duties as a litigant. After giving Lopez ample opportunities to comply, the Court first imposed evidentiary sanctions, with the warning that monetary sanctions would be imposed next if his misconduct continued. Undeterred, Lopez's hindering and delay tactics continued. The Bankruptcy Court then imposed monetary sanctions in the amount of \$8,130.50 (the "Monetary Sanctions"). Still undeterred, he continued to defy the Bankruptcy Court's authority by failing to pay any portion of the Monetary Sanctions despite unrefuted evidence of his ability to easily pay the entire sum.

20 One day short of the first anniversary of the day the Phase II discovery enforcement process
21 began, it was crystal clear to everyone, including the Bankruptcy Court, that Lopez had no
22 intention of complying with either his duties as a litigant, or the Bankruptcy Court’s orders. Based
23 on that, the Court imposed terminating sanctions by striking Lopez’s answer/opposition to the
24 Involuntary Petition, and entering the Order for Relief (the “Terminating Sanction”), which the
25 Court recognized as the only effective sanction to remedy his misconduct at that point. No one
26 was surprised since the Court had specifically warned Lopez’s counsel that terminating sanctions

¹ *Estrada v. Speno & Cohen*, 49 Fed. R. Serv.3d 50 (9th Cir. 2001).

would be imposed if Lopez's behavior did not change. Indeed, the Court spoke for Petitioning Creditors when he admonished Lopez's counsel that: "[Lopez has] exhausted my good graces, Mr. Hayes."²

And even now, Lopez remains undeterred, and is continuing his efforts to halt his bankruptcy proceeding by filing an appeal that is devoid of merit. The extensive record in this case clearly supports the Bankruptcy Court's imposition of graduating discovery sanctions, and Lopez has failed to establish the requisite clear error to support a reversal of the Terminating Sanction. The Bankruptcy Court's Order, resulting from his continuing course of unrepentant misconduct, should be affirmed.

II. BASIS OF APPELLATE JURISDICTION

This is an appeal from a final order of the Bankruptcy Court. This Court has appellate jurisdiction pursuant to 28 U.S.C. §158(a)(1).

III. ISSUES PRESENTED

The Bankruptcy Court's Order imposing the Terminating Sanction was the last in a series of graduated sanctions, and based on Lopez's failure to comply with an earlier discovery order (requiring payment of the Monetary Sanctions). The Order was made pursuant to Rule 37(b) of the Federal Rules of Civil Procedure ("FRCP"), made applicable to the bankruptcy proceedings by Rule 9014(c) of the Federal Rules of Bankruptcy Procedure. Specifically, FRCP 37(b)(2)(A) sets forth seven options for a Court to consider in deciding how best to respond to a litigant who has refused to obey an earlier discovery order.

Here, after first imposing evidentiary sanctions, then the Monetary Sanctions (which were never paid), and threatening to impose terminating sanctions, the Bankruptcy Court determined that the Terminating Sanction was appropriate in light of Lopez's flagrant dilatory conduct. The Terminating Sanction is specifically authorized by FRCP 37(b)(2)(A)(iii) which provides that the court may issue an order "striking pleadings in whole or in part."³ Such an order is proper so long

² Appellee's Supplemental Appendix (hereafter, "ASA") Tab 119, Reporters Transcript (11/19/07), page 0388.

³ FRCP 37(b)(2)(A)(iii).

1 as it is “just.”⁴ Thus, the issue in this appeal may be succinctly stated as: *In light of the totality of*
 2 *the circumstances surrounding Lopez’s discovery misconduct and the prior discovery orders,*
 3 *did the Bankruptcy Court improperly exercise its discretion by issuing the Terminating*
 4 *Sanction?*

5 IV. STANDARDS OF REVIEW

6 A. The Bankruptcy Court’s Factual Findings Are Reviewed Under the *Clearly* 7 *Erroneous Standard.*

8 The Bankruptcy Court’s findings of fact in support of its Order imposing the Terminating
 9 Sanction are reviewed under the clearly erroneous standard.⁵ An appellate court’s “*review under*
 10 *the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction*
 11 *that a mistake has been committed.*”⁶ The lower court’s findings will not be disturbed unless they
 12 are patently implausible.⁷ The Ninth Circuit has adopted the Seventh Circuit’s graphic description
 13 of the heavy burden this standard places on an appellant:

14 To be clearly erroneous, a decision must strike us as more than just
 15 maybe or probably wrong; it must, as one member of this court
 recently stated during oral argument, strike us as wrong with the
 force of a five-week-old, unrefrigerated dead fish.⁸

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21 ⁴ FRCP 37(b)(2)(A) (if a party has failed to obey a prior discovery order, then “the
 22 court where the action is pending may issue further just orders”).

23 ⁵ *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 379 (9th Cir. 1988) (“We review
 24 a district court’s findings of fact in connection with a motion for sanctions under the clearly
 erroneous standard”).

25 ⁶ *Security Farms v. International Broth. of Teamsters, Chauffers, Warehousemen &*
 26 *Helpers*, 124 F.3d 999, 1014 (9th Cir. 1997), quoting, *Exxon Co. v. Sofec Inc.*, 54 F.3d 570, 576
 (9th Cir. 1995), aff’d, 517 U.S. 830, 116 S.Ct. 1813 (1996).

27 ⁷ *Hayes v. Woodford*, 301 F.3d 1054, 1067 (9th Cir. 2002).

28 ⁸ *Id.* (internal quotations and citations omitted).

1 **B. The Bankruptcy Court's Decision to Order the Terminating Sanction is Reviewed**
 2 **Under the Deferential *Abuse of Discretion* Standard.**

3 The Bankruptcy Court's decision to issue the Terminating Sanction is reviewed under the
 4 abuse of discretion standard.⁹ Under this deferential standard, “[t]he question is not whether this
 5 court would have, as an original matter, imposed the sanctions chosen by the trial court, but
 6 whether the trial court exceeded the limits of its discretion.”¹⁰ The Bankruptcy Court's ruling
 7 should not be disturbed unless this Court “has a definite and firm conviction that the lower court
 8 committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant
 9 factors.”¹¹ In other words, the Bankruptcy Court's choice of an appropriate sanction should be
 10 affirmed unless this Court has “a definite and firm conviction that it was clearly outside the
 11 acceptable range of sanctions.”¹²

12 **V. STATEMENT OF THE CASE/FACTUAL & PROCEDURAL BACKGROUND**

13 **A. Filing of the Involuntary Petition and Lopez's First Motion to Dismiss.**

14 **06/30/05:** Alan Stanly acted as the Petitioning Creditor for the involuntary bankruptcy petition
 15 that commenced this case. [Appellant's Excerpts (hereafter “AR”) Document 1.]

16 **07/20/05:** Lopez responded to the Petition with a Motion to Dismiss, alleging bad faith, an
 17 improper venue, and that the Petition fails to state a claim because Lopez had more than 12
 18 Creditors. [ASA Tab 6 at ¶ 4, ln. 5-13.]

19 **08/05/05:** Opposition to the Motion to Dismiss was filed [AR Docket Nos. 8, 9 and 11; p.
 20 0028-0029.]

21 **08/22/05:** The Bankruptcy Court conducted a hearing on Lopez's Motion to Dismiss. At the
 22 outset of that hearing, Lopez's Counsel conceded that the Court cannot rely on Lopez's conclusory

24 ⁹ *Halaco Engineering Co. v. Costle*, supra, 843 F.2d at 379 (“We review sanctions
 25 imposed by a district court for abuse of discretion and will not reverse absent a definite and firm
 26 conviction that the district court made a clear error of judgment”).

27 ¹⁰ *Halaco Engineering Co. v. Costle*, supra, 843 F.2d at 379.

28 ¹¹ *Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir. 1996).

29 ¹² *Estrada v. Speno & Cohen*, 49 Fed. R. Serv.3d 50 (9th Cir. 2001), quoting, *Malone*
 30 v. *United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987).

1 assertion that there are more than 12 Creditors as a basis for dismissal. [ASA Tab 23, Reporters
 2 Transcript (8/22/05), p. 0027] The Court denied the Motion, and required an Answer to be filed by
 3 September 7, 2005. [ASA Tab 16, Minute Order; ASA Tab 20, Order denying Motion without
 4 prejudice].]

5 **09/07/05:** Lopez answered the Involuntary Petition and asserted several defenses, including
 6 that the Court lacked of subject matter jurisdiction because he has more than 12 Creditors, and the
 7 Petition was only filed by one of them. [ASA Tab 22, Answer.]

8 **B. Lopez Has the Case Bifurcated.**

9 **11/22/05:** Lopez filed a motion for an order bifurcating the proceedings and requiring the
 10 posting of a bond by the Petitioning Creditor. The primary thrust of the motion was that Lopez has
 11 22 creditors, and, since 22 is more than 12, there must be three petitioning creditors. [ASA Tab
 12 27, pp. 0052 - 0054.] The request for a bond was made to cover Lopez's damages in the event that
 13 the Petition was unsuccessful. [*Id.* at p. 0054] The motion was opposed. [AR Tab B, Docket Item
 14 32, p.0031.]

15 **12/19/05:** The Bankruptcy Court conducted its hearing on the bifurcation motion, and granted
 16 bifurcation to consider first the number of creditors that Lopez had, and were required to be
 17 included in the 11 USC § 303(b)(2) count. The Court noted that the request for a bond was
 18 withdrawn. [ASA Tab 35, Minute Order.]

19 **C. Lopez's Second Motion to Dismiss.**

20 **03/27/06:** Lopez filed a Motion to Dismiss the involuntary proceeding. The basic premise of
 21 the motion was that Lopez and his wife had agreed to sell their residence in Florida, and use the
 22 proceeds to pay all creditors in full, but could not do so because the pending bankruptcy case
 23 created a "cloud" on their title. [ASA Tab 40.]

24 **03/29/06:** Stanly filed an opposition to the Motion to Dismiss. The basis for opposing the
 25 motion included the fact that there was no evidence to indicate that the sales proceeds would be
 26 adequate to the alleged purpose; and that there was substantial evidence that Lopez had previously
 27 made promises to his creditors in court proceedings (in the form of a "Stipulation for Temporary
 28 Protective Order"), and then intentionally violated the stipulation by absconding with substantial

1 proceeds. [ASA Tab 43.]

2 **03/30/06:** Stanly filed an *ex parte* Verified Application for Appointment of a Trustee as an
 3 emergency measure to prevent Lopez from closing the sale of his residence without court
 4 authority. [ASA Tab 47.] This emergency motion was necessary because Stanly had just learned
 5 that the sale was about to close seven days later without any notice to the Court or the parties.
 6 [ASA Tab 47, p. 0092, ln. 3-17.]

7 **04/03/06:** The Bankruptcy Court conducted its hearing on the Motion to Dismiss and the *ex*
 8 *parte* Verified Application for Appointment of a Trustee. [AR Tab B, Docket Item 48 p.0034.]
 9 On the record, Lopez's counsel stipulated to the entry of a consent order enjoining the sale of his
 10 residence without Court approval, and the request for a Trustee was withdrawn on that basis. [*Id.*,
 11 see also, ASA Tab 52.]

12 **D. The Prosecution and Conclusion of Phase I.**

13 **12/21/05:** Creditor Northwest Florida Daily News filed a joinder as a Petitioning Creditor.
 14 [AR Tab B Docket item 36 at p.0032.]

15 **12/29/05:** Disputed creditor Alternative Resolution Center filed a joinder as a Petitioning
 16 Creditor. [*Id.* at Docket item 37.]

17 **05/29/06:** Petitioning Creditors filed a Motion for Summary Judgment on Bifurcated Phase I.
 18 [AR Tab B Docket Nos. 56-60 at p.0035.]

19 **06/26/06:** The Bankruptcy Court conducted its hearing on the Motion for Summary Judgment
 20 on Bifurcated Phase I, and ordered the simultaneous filing of supplemental briefs with the matter
 21 then to be under submission. [ASA Tab 76.] The supplemental briefs were filed as ordered. [AR
 22 at Docket Nos. 77 and 78 at p.0038.]

23 **09/26/06:** The Bankruptcy Court entered its formal "Order on Motion for Summary
 24 Judgment" [ASA Tab 86.] in which it held that there are "only five holders of claims against
 25 Lopez that qualify to be counted under §303(b)(2). Since this is clearly 'fewer than 12' the petition
 26 was properly filed by one claim holder — Stanly." [ASA Tab 86, p. 0130, ln.1 - 4 & 9 - 12.] That
 27 Order, which is now final and not the subject of appeal, ended Phase I of the contested Petition,
 28 and opened the door for discovery in Phase II.

1 E. **Lopez Hindered, Delayed and Ultimately Refused to Provide Adequate Responses to**
 2 **Written Discovery Despite Multiple Orders and Admonishments from the**
 3 **Bankruptcy Court.**

4 **11/03/06:** Lopez was served with Petitioning Creditors' First Set of Written Discovery for
 5 Phase II of the bifurcated proceeding (the "Phase II Written Discovery"), consisting of (1) First
 6 Phase II Requests for Admission Propounded by Petitioning Creditors [10 Requests]; (2) First
 7 Phase II Request for Production of Documents by Petitioning Creditors [162 categories of
 8 documents]; and (3) First Phase II Interrogatories Propounded by Petitioning Creditors [35
 9 Interrogatories]. Lopez's responses to the Phase II Written Discovery were due on December 4,
 10 2006. [ASA Tab 105-2, p. 0173, ln. 5.]

11 **12/03/06:** Lopez served "Response to Requests for Admission Propounded to Alleged Debtor
 12 Francis J. Lopez (Phase II)." **Lopez's responses were deficient, and Lopez failed to verify the**
 13 **responses.** [ASA Tab 105-2, p. 0173, ln. 6 - 8.]

14 **12/05/06:** Lopez served "Response to Interrogatories Propounded to Alleged Debtor Francis J.
 15 Lopez (Phase II). **Lopez's responses were deficient, and Lopez failed to verify the responses.**
 16 Lopez also served "Response to Requests for Production of Documents." **Lopez's responses**
 17 **were deficient.** [ASA Tab 105-2, p. 0173, ln. 9 -12.]

18 **12/13/06:** Petitioning Creditors' attorney, L. Scott Keehn ("Attorney Keehn"), sent a *meet and*
 19 *confer* letter to Lopez's attorney, M. Jonathan Hayes ("Attorney Hayes"), notifying him of the
 20 deficiencies in Lopez's responses to the Phase II Written Discovery. [ASA Tab 105-2, p. 0173,
 21 ln. 13 - 15.]

22 **12/15/06:** Attorneys Keehn and Hayes participated in a telephonic *meet and confer* conference
 23 wherein the parties agreed that Lopez would provide supplemental responses to the Phase II
 24 Written Discovery on or before January 12, 2007. [ASA Tab 105-2, p. 0173, ln. 16 - 18.]

25 **01/12/07:** Deadline for Lopez to provide the promised supplemental responses to the Phase II
 26 Written Discovery. **Lopez failed, without explanation, to provide supplemental responses to**
 27 **the Phase II Written Discovery.** [ASA Tab 105-2, p. 0173, ln. 19 - 21.]

28 **01/19/07:** Attorney Keehn sent a follow-up *meet and confer* letter to Attorney Hayes

1 requesting an explanation regarding Lopez's failure to provide the promised supplemental
 2 responses to discovery, and notifying Lopez of the imminent likelihood of a motion to compel his
 3 responses to the Phase II Written Discovery. **Lopez failed, without explanation, to respond to**
 4 **that *meet and confer* letter.** [ASA Tab 105-2, p. 0173, ln. 22 - 26.]

5 **01/29/07:** Petitioning Creditors filed a Motion to Compel responses to the Phase II Written
 6 Discovery wherein they requested an award of monetary sanctions in the amount of \$4,242 (the
 7 "First Motion to Compel"). **Lopez failed, without explanation, to respond or file an**

8 **Opposition to the First Motion to Compel.** [ASA Tab 105-2, p. 0173, ln. 27 - p.0174, ln. 1.]

9 **03/10/07:** On a Saturday, just two days prior to the hearing scheduled on the First Motion to
 10 Compel, Attorney Hayes emailed approximately 155 pages of documents to Attorney Keehn,
 11 purportedly in response to the "First Phase II Request for Production of Documents by Petitioning
 12 Creditors." **This last-minute "document dump" was improper because the documents:**
 13 **(1) were not responsive to the Requests, (2) were not organized by category of Request, and**
 14 **(3) consisted of at least 103 pages of pleadings filed in the San Diego Superior Court which**
 15 **Lopez knew were already in Petitioning Creditors' possession. Lopez failed, without**
 16 **explanation, to explain the deficiencies and/or his failure to provide the agreed-upon**
 17 **supplemental responses.** [ASA Tab 105-2, p. 0174, ln. 2 - 10.]

18 **03/12/07:** The Bankruptcy Court granted the First Motion to Compel. [ASA Tab 93.] The
 19 Court ordered Lopez to provide the supplemental responses on or before April 11, 2007. The
 20 Court — in open session — indicated that it was deferring its ruling on the request for monetary
 21 sanctions of \$4,242 because: (a) it wanted the risk of those sanctions to serve as a *Sword of*
 22 *Damocles* to encourage compliance with the Court's order, and (b) Lopez would have to "*earn his*
 23 *way out of those sanctions.*" [ASA Tab 168, Reporters Transcript (03/12/07), p. 0598.]

24 **04/11/07:** The date Lopez placed his supplemental discovery responses in the mail from a
 25 Florida postal station. [ASA Tab 105-2, p. 0174, ln. 18 - 22.]

26 **04/13/07:** Since Petitioning Creditors had not yet received the supplemental discovery
 27 responses that had been mailed from Florida on April 11, 2007, they filed a "Motion for an
 28 Enforcement Order: (1) striking the Debtor's Answer; (2) Entering an Order for Relief; and (3)

1 Imposing Monetary Sanctions Against the Debtor.” [ASA Tabs 97 through 97-3.] This Motion
 2 was withdrawn on April 18, 2008. [ASA Tab 102.] **However, the supplemental responses were**
 3 **patently deficient, and prompted another round of the *meet and confer* process.**

4 **05/11/07:** The Bankruptcy Court held a status conference wherein it ordered Lopez to file
 5 supplemental discovery responses to the Phase II Written Discovery on or before May 21, 2007.
 6 [ASA Tab 104.] The Court further ordered that any motion to compel further responses must be
 7 filed on May 25, 2007. [ASA Tab 104.]

8 **05/21/07:** (1) Deadline for Lopez to supplement his supplemental responses to the Phase
 9 II Written Discovery. **Lopez failed to provide supplemental responses as required by the**
 10 **Bankruptcy Court’s Order.** [ASA Tab 105-2, p. 0175, ln. 6 - 9.]

11 (2) After the close of business, at 7:10 P.M., Attorney Hayes emailed Attorney
 12 Keehn a request for two additional days for Lopez to supplement his responses to the Phase II
 13 Written Discovery. [ASA Tab 105-2, p. 0175, ln. 6 - 9.]

14 **05/22/07:** Attorney Keehn responded to Attorney Hayes’ email by granting the requested two-
 15 day extension of time, in exchange for a stipulation providing Petitioning Creditors with an
 16 extension of time – from May 25, 2007 to May 30, 2007 – to file any necessary discovery motion.
 17 [ASA Tab 105-2, p. 0175, ln. 9 - 13.]

18 **05/23/07:** Attorney Hayes emailed Attorney Keehn to withdraw Lopez’s request for an
 19 extension of time, and notify him that Lopez would not be providing any additional responses to
 20 the Phase II Written Discovery. [ASA Tab 105-2, p. 0175, ln. 14 - 17.]

21 **05/24/07:** Petitioning Creditors filed their “Motion for an Enforcement Order: (1) Imposing
 22 Monetary Sanctions Against the Debtor; and (2) Imposing Evidentiary Sanctions Against the
 23 Debtor” (the “Second Motion to Compel”) wherein they renewed their request for monetary
 24 sanctions in the amount of \$4,242. [ASA Tabs 105 through 105-4.]

25 **06/25/07:** The Bankruptcy Court imposed evidentiary sanctions against Lopez as requested in
 26 the Second Motion to Compel, and deferred the ruling on Petitioning Creditors’ request for
 27 monetary sanctions, indicating that the Court still wanted them to act as a *Sword of Damocles* and
 28 would address them later. [ASA Tab 110, Reporter’s Transcript (06/25/07), page 0311.]

1 **F. Lopez Continued His Delay Tactics in Connection with His Deposition.**

2 **06/25/07:** Attorney Hayes and Attorney Keehn conferred in person regarding Petitioning
 3 Creditors' request to take Lopez's deposition. At that time, Attorney Keehn stated that he would
 4 like to calendar Lopez's deposition before July 31, 2007 because he would be out of the office for
 5 virtually the entire month of August. The attorneys agreed that either July 20 or July 27 would
 6 work on their calendars, and Attorney Hayes stated that he would inquire as to Lopez's availability
 7 on those dates. [ASA Tab 114-2, p. 0325, ln. 16 - 21.]

8 **06/28/07:** Attorney Hayes emailed Attorney Keehn the following message: "*I have spoken to*
 9 *my client about the deposition dates we discussed, July 20 or 27. He is checking his calendar. I*
 10 *will let you know shortly.*" (Emphasis added.) [ASA Tab 114-2, p. 0325, ln. 22 - 24.]

11 **07/20/07:** Twenty-two days after the June 28, 2007 email — in the early evening — Attorney
 12 Hayes transmitted an email suggesting, for the first time, July 31, 2007, as an available date for
 13 Lopez's deposition. [ASA Tab 114-2, p. 0326, ln. 1 - 3.] Given that July 31, 2007 would be
 14 Attorney Keehn's last day in the office before a 30-day vacation, he knew he would be fully
 15 engaged with matters necessary to be completed in preparation for that absence. Because of that,
 16 and because of the fact that he had received absolutely no communication from Attorney Hayes'
 17 office following the June 28, 2007 email, Attorney Keehn issued and mailed to Attorney Hayes a
 18 notice of Lopez's deposition for Tuesday, September 11, 2007, at 9:00 a.m. in San Diego,
 19 California. [ASA Tab 114-2, p. 0326, ln. 4 - 9.]

20 **07/31/07:** The Bankruptcy Court conducted a Status Conference wherein Attorney Keehn
 21 reported to the Court the events summarized above, including the fact that Petitioning Creditors
 22 had noticed Lopez's deposition for September 11, 2007. Attorney Hayes stated in open court that
 23 he would communicate that information to Lopez, and inform Petitioning Creditors if Lopez could
 24 not attend his deposition on the scheduled date. That was the last Petitioning Creditors heard from
 25 Attorney Hayes until September 10, 2007. [ASA Tab 114-2, p. 0326, ln. 10 - 14.]

26 **09/10/07:** Less than 24 hours before Lopez's deposition was scheduled to begin, Attorney
 27 Hayes sent Attorney Keehn a brief email stating that Lopez was "*unable to make travel*
 28 *arrangements for the deposition tomorrow.*" The email suggested October 8, 2007 or October 22,

1 2007 as possible dates for the deposition. [ASA Tab 114-2, p. 0326, ln. 15 - 20.]

2 **10/01/07:** The Bankruptcy Court conducted a status conference on the Involuntary Petition.
 3 Petitioning Creditors renewed the request to impose monetary sanctions. The Court recognized
 4 that the *Sword of Damocles* had not worked, the “*string has been severed*” and monetary sanctions
 5 would be considered at the next hearing. [ASA Tab 169, p. 0607.]

6 **10/19/07:** Petitioning Creditors filed a “Motion for an Enforcement Order imposing Monetary
 7 Sanctions Against the Debtor” (the “Third Motion to Compel”) wherein they requested an award
 8 of monetary sanctions in the amount of \$12,133.50. The requested sanctions consisted of actually-
 9 incurred legal fees as follows: (a) \$3,155.00 for preparing the motion; (b) \$2,164.50 for preparing
 10 the necessary documents and questions for Lopez’s deposition (that he cancelled less than 24
 11 hours before it was scheduled to begin); (c) \$224.00 for conferring with Lopez’s attorney
 12 regarding Lopez’s *last minute* failure to appear for his deposition; and (d) \$6,590.00 for preparing
 13 Petitioning Creditors’ renewed motion for the monetary sanctions originally requested on May 24,
 14 2007. [ASA Tabs 114 through 114-2.]

15 **10/22/07:** Lopez appeared for his deposition in San Diego, California. [ASA Tab 126-1, p.
 16 0471, ln. 19 - 20.]

17 **11/19/07:** The Bankruptcy Court granted Petitioning Creditor’s Third Motion to Compel, and
 18 imposed monetary sanctions against Lopez in the amount of \$8,130.50. The Court made it clear
 19 that the entire sum was due and payable within thirty (30) days from that date – December 19,
 20 2007. **The Court admonished Lopez, through his counsel, that failure to pay the sanctions
 21 could result in terminating sanctions. That admonishment concluded with this point-blank
 22 warning:**

23 But at this point in time, those sums will be required to be paid within thirty days to Mr.
 24 Keehn’s firm. And your client should be made very aware, Mr. Hayes, that if he fails to
 25 pay that total sum within thirty days of today’s date – and that’s today’s date, not the date of
 26 the entry of the order – within thirty days of today’s date, I will consider a terminating
 27 sanction motion to strike his opposition to the petition. And we’ll take it from there.
 28 [ASA, Tab 119 Reporters Transcript (11/19/07), p. 0385 - 0387.]

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1 **G. Despite The Bankruptcy Court's Explicit Warnings that Terminating Sanctions May
2 be Issued if Lopez Failed to Pay the Monetary Sanctions, Lopez Failed to Pay Any
3 Portion of the Monetary Sanctions.**

4 **11/26/07:** Petitioning Creditors sent Lopez's counsel a copy of the lodged Sanction Order,
5 together with wire transfer instructions for the Keehn & Associates, APC general operating
6 account to facilitate timely compliance. The accompanying Transmittal Memorandum emphasized
7 the importance of timely payment as follows:

8 The court has now imposed upon Mr. Lopez the duty to pay the full \$8,130.50
9 awarded in sanctions. The enclosed wire instructions are provided to facilitate his
10 full and timely discharge of that duty. The Petitioning Creditors would first steal
11 and then paraphrase Admiral Lord Nelson's famous signal to his fleet as the Battle
12 of Trafalgar was about to commence: *The United States Bankruptcy Court expects
13 every man to do his duty!* The Petitioning Creditors hold the same expectation.

14 This was intended to provide Lopez with advance warning that no delay in payment would be
15 tolerated by Petitioning Creditors. [ASA Tab 126-1, p.0470, ln. 26 - p.0471, ln. 2 & p.0480.]

16 **11/26/07 - 12/18/07:** Lopez provided nothing but the *sounds of silence*. [ASA Tab 126-1,
17 p.0471, ln. 3 - 4.]

18 **12/19/07:** **The Sanctions Deadline.** Lopez, through counsel, communicated that he could not
19 pay the full sanctions award, and offered to pay \$4,000 plus \$1,000 per month thereafter.

20 However, Lopez failed to tender the \$4,000 or any portion thereof. [ASA Tab 126-1, p.0471, ln. 5
21 - 13 & p. 0490]

22 **12/20/07:** Petitioning Creditors, through counsel, responded to Lopez's counsel by declining
23 to acquiesce to any adjustment in the payment schedule imposed by the Sanctions Order. The
24 reason for that position was specifically summarized as follows:

25 I do not now believe, nor have I ever since the date that I served you with the order
26 and our bank wire instructions believed that your client lacked the financial ability
27 to timely comply with the Court's order. I am informed and believe that my client
28 has or has access to the evidence necessary to establish the validity of my belief. I
 say that so that your client has fair warning that should he be inclined to submit a
 declaration under penalty of perjury to the effect that he did not comply with the
 court's sanctions order because he lacked the financial ability to do so, he does so at
 his peril. [ASA Tab 126-1, p.0471, ln. 14 - 17 & p. 0492.]

29 **12/20/07 - 01/15/07:** Lopez failed to tender any portion of the Sanctions, and provided nothing
30 other than the familiar *sounds of silence*. [ASA Tab 126-1, p.0471, ln. 3 - 4.]

1 **12/27/07:** Petitioning Creditors filed their Motion for Terminating Sanctions based on
 2 Lopez's failure, without justification or excuse, to pay any portion of the Sanctions. [ASA Tabs
 3 121 through 121-2.]

4 **01/15/08:** Lopez mailed his opposition to the Motion for Terminating Sanctions, supported by
 5 his conclusory statement that he lacked the ability to comply with the Bankruptcy Court's order.
 6 [ASA Tab 125, Proof of Service, p. 0469.]

7 **01/22/08:** Petitioning Creditors filed their Reply which included unrefuted evidence of
 8 Lopez's available income, and ability to pay the Monetary Sanctions. [AR Tab B, Docket Nos. 126
 9 and exhibits; ASA Tab 133, Reporter's Transcript, (01/28/08, p. 0537.)]

10 **01/28/08:** (1) The Bankruptcy Court conducted a hearing on the Motion for Terminating
 11 Sanctions. Attorney Hayes admitted in open court that prior to the hearing he had advised Lopez
 12 that if he could take "*a check*" to the hearing for payment of some or all of the Sanctions, then
 13 Lopez could probably avoid the terminating sanctions. [ASA Tab 133, Reporter's Transcript
 14 (01/28/08), p. 0540.] Lopez declined to do so, and his attorney never challenged the Reply
 15 evidence showing he had the ability to do so. [Id. at p. 0537.]

16 (2) The Bankruptcy Court granted the Motion for Terminating Sanctions, and
 17 struck Lopez's Answer. [ASA Tab 127.]

18 (3) The Bankruptcy Court entered an Order for Relief, ordering Lopez to file
 19 the requisite Schedules and Statements within 15 days of the Order. [ASA Tab 128.] Lopez failed
 20 to comply with that Order, and instead filed this Appeal. [ASA Tab 130.]

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VI. DISCUSSION

A. FRCP 37 Empowered the Bankruptcy Court to Strike Lopez's Answer.

“Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court orders enforcing those rules.”¹³ FRCP 37 was made applicable to this bankruptcy case by FRBP 9014(c), and granted the Bankruptcy Court broad discretion to tailor appropriate sanctions for Lopez’s unjustified refusal to comply with its 11/19/2007 Discovery Order imposing the Monetary Sanctions.¹⁴

Where, as here, an alleged debtor has engaged in a course of serious discovery misconduct, which includes failure to comply with prior court orders, the bankruptcy court may issue a terminating sanction consisting of an order striking the debtor's answer and entering an Order for Relief.¹⁵ Here, Lopez had repeatedly demonstrated that he is unmoved by either the threat of monetary sanctions, or an actual order from the Bankruptcy Court imposing the threatened monetary sanctions. He *thumbed his nose* at Petitioning Creditors and the Bankruptcy Court's authority by simply refusing to pay the Monetary Sanctions, even though unrefuted evidence established that Lopez had the financial resources to pay the entire amount.

Based on that blatant display of defiance, and after considering the totality of the circumstances as they are memorialized by the record of Lopez’s pervasive misconduct, the Bankruptcy Court reasoned that terminating sanctions were necessary and appropriate; and imposing any lesser sanction “*would be just as if Mr. Lopez could continue to ignore this Court’s*

¹³ *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983).

¹⁴ *Matter of Visioneering Const.*, 661 F.2d 119, 123 (9th Cir. 1981) (“The bankruptcy court, faced with an obstreperous alleged bankrupt, unequivocally had the power to apply Fed.R.Civ.P. 37 sanctions for obstruction of discovery”); *In re Williams*, 215 B.R. 289, 299 (Dist. Ct. D.R.I. 1997) (“the choice and severity of the sanction imposed is a matter reserved to the sanctioning court’s discretion”).

¹⁵ *In re Rice*, 14 B.R. 843, 846 (9th Cir.BAP 1981); *Matter of Visioneering Const.*, supra, 661 F.2d at 123 (court's order striking alleged debtor's answer was an appropriate sanction since the debtor had "deliberately and obstinately refused to cooperate with discovery requests and court orders"); *De Falco v. Oak Lawn Public Library*, 25 Fed.Appx. 455, 457 (7th Cir. 2001) (terminating sanctions appropriate where the plaintiff "flouted the district court's order and exemplified the delay and avoidance to which the court referred").

¹⁶ That decision is authorized by FRCP 37(b), and may not be disturbed without “*a definite and firm conviction that it was clearly outside the acceptable range of sanctions.*”¹⁷

B. Given Lopez's Egregious Misconduct and Prior Violations, the Terminating Sanction Was Within the Acceptable Range of Available Sanctions Pursuant to FRCP 37(b).

FRCP 37(b)(2) gives a court broad discretion to issue discovery orders that are *just* under the particular circumstances of each case. “*Thus the central factor in evaluating the district court order is justice, and everyone has notice from the text of Rule 37(b)(2) that [striking a party’s pleading] is a possible sanction for failure to obey discovery orders.*”¹⁸ To determine whether an order issuing terminating sanctions is *just*, the Ninth Circuit has adopted a test, consisting of an evaluation of the following five factors:

- (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the [party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.¹⁹

However, the five factors are not exclusive, and do not constitute a *bright line* test. Rather, they provide “*a way for a district judge to think about what to do, not a series of conditions precedent before the judge can do anything.*”²⁰ Ultimately, an appellate court will not reverse the lower court’s decision to issue a particular sanction without a “*a definite and firm conviction that the district court made a clear error in judgment.*”²¹ Here, consideration of the five factors in connection with the entire record of Lopez’s misconduct supports the Bankruptcy Court’s decision

¹⁶ ASA Tab 133, Reporter's Transcript (01/28/08), p. 0541.

¹⁷ *Estrada v. Speno & Cohen*, supra.

¹⁸ *Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d 1051, 1056-1057 (9th Cir. 1998); FRCP 37(b)(2)(A)(iii) (the court may issue an order “striking pleadings in whole or in part”).

¹⁹ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

²⁰ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

²¹ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

1 to order the Terminating Sanction.²²

2 **(1) The Public's Interest in Expedited Resolution of Litigation; and (2) The Court's**
 3 **Need to Manage its Dockets.**

4 These first two factors support an order issuing terminating sanctions where, as here, a
 5 litigant has already violated a prior discovery order, and engaged in conduct to hinder and delay
 6 discovery.²³ Indeed, the district courts are bound by the legislative mandate set forth in both FRCP
 7 and FRBP 1001, requiring that the discovery statutes (and other Federal rules) “*be construed and*
 8 *administered to secure the just, speedy, and inexpensive determination of every action and*
 9 *proceeding.*”²⁴ Litigants like Lopez make that impossible to accomplish. Because of that, FRCP
 10 37(b) empowers courts to protect the integrity of the judicial system by issuing terminating
 11 sanctions.

12 From the outset, Lopez has hindered and delayed this case. First, the case was bifurcated at
 13 his insistence, and over Petitioning Creditors objection. While there is nothing wrong with that
 14 fact *in a vacuum*, the unavoidable delay resulting from that bifurcation should heighten the duty of
 15 the requesting litigant to proceed with good faith and alacrity when defeat in Phase I ushers in the
 16 discovery process in Phase II.

17 Then, after losing Phase I, Lopez refused to provide adequate responses to the Phase II
 18 Written Discovery, forcing Petitioning Creditors to incur the cost of multiple rounds of fruitless
 19 *meet and confer* dialogue, and formal motions seeking orders from the Bankruptcy Court — filed
 20 on January 29, 2007 (the First Motion to Compel), and again on May 24, 2007 (the Second Motion
 21 to Compel). That battle finally ended on June 25, 2007 — *over 6 months after the date the*
 22 *discovery should have been produced* — with Lopez refusing to produce further discovery, and the
 23 Bankruptcy Court responding to that refusal by imposing evidentiary sanctions prohibiting Lopez
 24 from using any evidence at trial that he had refused to produce in response to discovery. The

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 26 ²² *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d
 1062, 1068 (2nd Cir. 1979) (“sanctions must be weighed in light of the full record in the case”).

27 ²³ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

28 ²⁴ FRCP 1; FRBP 1001.

1 Court specifically warned Lopez, through his counsel, that monetary sanctions would be imposed
 2 if the misconduct continued.²⁵

3 Lopez continued his *hinder and delay* strategy in connection with his deposition, and
 4 caused further delay and expense, all of which necessitated the Third Motion to Compel. The
 5 Bankruptcy Court granted that Motion and imposed the Monetary Sanctions of \$8,130.50.
 6 Unimpressed, Lopez failed to obey the Order. To this day, not one penny of the Monetary
 7 Sanctions has been paid.

8 Lopez's refusal to perform his duties as a litigant, and his blatant defiance of the
 9 Bankruptcy Court's authority, demonstrate an inherent lack of respect for the court system in
 10 general, and particularly for the Bankruptcy Court's need to manage its docket effectively in order
 11 to expeditiously and fairly resolve *all* the cases pending before it. The Ninth Circuit encourages
 12 terminating sanctions against individuals like Lopez, whose conduct threatens the integrity of the
 13 entire system, and only serves as a *bad example* to other litigants:

14 Where it is determined that counsel or a party has acted willfully or
 15 in bad faith in failing to comply with rules of discovery or with court
 16 orders enforcing the rules or in flagrant disregard of those rules or
 17 orders, it is within the discretion of the trial court to dismiss the
 18 action or to render judgment by default against the party responsible
 19 for noncompliance. Fed.R.Civ.P. 37(b). Here the court dismissed the
 20 plaintiffs' action with prejudice. It acted properly in so doing. We
 21 encourage such orders. Litigants who are willful in halting the
 22 discovery process act in opposition to the authority of the court and
 23 cause impermissible prejudice to their opponents. It is even more
 24 important to note, in this era of crowded dockets, that they also
 deprive other litigants of an opportunity to use the courts as a serious
 dispute-settlement mechanism. Here the appellants' last-minute
 tender of relevant documents could not cure the problem they had
 previously created. As the Supreme Court stated in upholding a
 dismissal for failure to comply with a discovery order, "[although] it
 might well be that *these* [litigants] would faithfully comply with all
 future discovery orders entered by the District Court in this case . . .
 [if the order of dismissal were overturned] other parties to other
 lawsuits would feel freer than we think *Rule 37* contemplates they
 should feel to flout other discovery orders of other district courts."²⁶

25 ASA Tab 110, Reporters Transcript (06/25/07), p. 0311.

26 *G-K Properties v. Redevelopment Agency of San Jose*, 577 F.2d 645, 647-648 (9th Cir. 1978), quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976) (per curiam) (emphasis in original).

1 Here, Lopez argues that terminating sanctions should not have issued since he ultimately
 2 appeared “*voluntarily*” for his deposition — albeit three months *after* it had been originally
 3 scheduled, and *after* the Third Motion to Compel. At that point, the Bankruptcy Court was very
 4 familiar with Lopez’s pattern of hindering, delaying and excuse-mongering before offering the
 5 slightest gesture of compliance by, e.g., serving deficient responses to discovery, and finally
 6 appearing for a deposition (after dramatically bemoaning the inconvenience and expense it would
 7 cause him). Litigation simply can not proceed that way. And, as the Ninth Circuit has observed,
 8 terminating sanctions are an appropriate means to ensure that it does not have to:

9 Parties may not wilfully, repeatedly, and persistently disobey court
 10 orders even after receiving graduating sanctions. There is -- and
 11 there must be -- sufficient play in the joints of our system to allow a
 12 district judge to impose the ultimate sanction on such obstreperous
 13 parties. Otherwise, the wheels of justice would quickly grind to a
 14 halt.²⁷

15 The Bankruptcy Court wisely recognized when it needed to say *enough is enough*, and end
 16 the matter with terminating sanctions. Doing so was a proper exercise of the Bankruptcy Court’s
 17 discretion, and the Order should be affirmed.

18 **(3) The Risk of Prejudice to the Party Seeking Sanctions.**

19 This factor weighs in favor of the Bankruptcy Court’s Order. Lopez argues that even
 20 though he “*has perhaps been dilatory with some of his responses and in making preparations to*
 21 *attend his second deposition in San Diego,*”²⁸ Petitioning Creditors have not been prejudiced by
 22 his failure to pay the Sanctions. The argument is disingenuous at best.

23 The failure to pay the ordered Monetary Sanctions was the proverbial *last straw* in a series
 24 of misconduct that in its totality warranted the Terminating Sanction. The *last straw*, standing
 25 alone, never breaks the camel’s back, but is a part of the totality of straws that caused the fracture.
 26 Looking only at the *last straw* will always lead to an incomplete analysis, and a flawed conclusion.

27 As quoted above, the Ninth Circuit recognizes that “[l]itigants who are willful in halting

27 *Estrada v. Speno & Cohen*, supra.

28 Appellant’s Opening Brief, page 12.

*the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents.*²⁹ Petitioning Creditors have painstakingly set forth in their multiple Motions to Compel how Lopez's misconduct has prejudiced them and this case.

In connection with the Motions to Compel, Petitioning Creditors were forced to incur legal fees in excess of \$12,133.50. Beyond that, Lopez’s strategic delaying of the proceedings unfairly exposed all of his pre-petition creditors, including Petitioning Creditors, to unnecessary prejudice, the extent of which is currently unknown. During the *43 month* period of time from when the Petition was filed (06/30/2005) to when the Order for Relief was entered (01/28/2008), Lopez was free to incur new debt that will be superior to the claims of all pre-petition creditors due to the priority status given to Involuntary Gap Claims³⁰ under 11 U.S.C. §502(f) and 11 U.S.C. §507(a)(3). The specter of an ever-expanding body of Involuntary Gap Claims with priority over all other general creditors was an ominous threat to the economic utility of the Bankruptcy remedy sought by Petitioning Creditors. That plight of Lopez’s pre-petition creditors is exacerbated by the automatic stay which prevents them from taking any enforcement action to preserve the economic utility of their claims.³¹

16 The risk of prejudice was further heightened by the initial delay that was occasioned by the
17 bifurcation of the case — at Lopez’s request — so that the Involuntary Gap Period was necessarily
18 rendered longer than the norm. Lopez knew that, and so did the Bankruptcy Court. And with no
19 end to Lopez’s *game playing* in sight, it was appropriate for the Bankruptcy Court to finally *close*
20 *the gap* by issuing the Terminating Sanction, and entering the Order for Relief.

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²⁹ *G-K Properties v. Redevelopment Agency of San Jose*, supra, 577 F.2d at 647 (emphasis added).

30 Claims arising after the Petition date, and before entry of an Order for Relief.

³¹ See 11 U.S.C. §362(a).

1 **(4) The Public Policy Favoring Disposition of Cases on Their Merits.**

2 This factor typically weighs against a terminating sanction.³² However, as the Ninth
 3 Circuit has pointed out, there can be no true *trial on the merits* in a case where one of the parties
 4 can not be trusted to cooperate in the process and produce all available evidence, however
 5 damaging it may be to his case, to allow a just and proper resolution.³³ “*Where a party so*
 6 *damages the integrity of the discovery process that there can never be assurance of proceeding on*
 7 *the true facts,*” then a trial on the merits may indeed be impossible, and “*a case dispositive*
 8 *sanction may be appropriate.*”³⁴ That is exactly the case here, and the Bankruptcy Court knew it.
 9 That determination should not be disturbed unless the record establishes it is clearly erroneous.³⁵

10 **(5) The Availability of less Drastic Sanctions.**

11 The Ninth Circuit advises that this fifth factor “*involves consideration of three subparts:*
 12 *whether the court explicitly discussed alternative sanctions, whether it tried them, and whether it*
 13 *warned the recalcitrant party about the possibility of dismissal.*”³⁶ Here, the Bankruptcy Court did
 14 all three of the above, and therefore this factor weighs in favor of the Bankruptcy Court’s Order.

15 The Bankruptcy Court considered and tried multiple sanctions options — first, evidentiary
 16 sanctions and a deferred ruling on monetary sanctions, imposed on June 25, 2007; and later, an
 17 award of monetary sanctions in the amount of \$8,130.50, imposed on November 19, 2007. Before
 18 imposing the Monetary Sanctions, the Bankruptcy Court had decided to try deferring its ruling on
 19 them in order to hold the prospect as a *Sword of Damocles* over Lopez’s head, and thereby compel
 20 him to fulfill his duties as a litigant. At the hearing on Petitioning Creditors’ First Motion to
 21 Compel, the Court explained its intent with regard to deferring the imposition of monetary

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 23 ³² *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

24 ³³ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1058 (terminating sanctions
 25 were appropriate because the past discovery misconduct had “cast a pall upon the disobedient
 26 parties’ integrity and the expectation that this case is capable of a fair and just resolution on the
 27 merits”).

28 ³⁴ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1058.

29 ³⁵ *Hayes v. Woodford*, supra, 301 F.3d at 1067.

30 ³⁶ *Valley Eng'rs v. Electric Eng'g Co.*, supra, 158 F.3d at 1057.

1 sanctions:

2 I'm going to require that responses be supplied to Mr. Keehn within
 3 thirty days of today's date. And if there is any necessary resolution
 4 of the sanctions motion, I will do that at some point in time in the
 future. But at this point in time, I intend it to be the [Sword] of
 5 Damocles over Mr. Lopez's head. And I fully contemplate at this
 point in time and given the fact that there was no effort for a
 6 protective order, no effort for a continuance to comply because of
 the bulk of the requests or any of that kind of stuff, there was
 7 absolutely nothing done by [Lopez]; under those circumstances at
 this point in time and unless I see something that disabuses me of it,
 I intend at some future date to award sanctions in that amount
 8 [\$4,242]. . . He's got to earn his way out of it, if at all. And I'm not
 telling him that he necessarily can. So I will sign an order
 9 compelling . . . responses to Mr. Keehn within 30 days of today's
 date. But if it comes down to it, his client is not going to have to pay
 for going through this.³⁷

10 But the Bankruptcy Court had to *let the sword fall* when it was obvious that Lopez was impervious
 11 to the threat of monetary sanctions. The Bankruptcy Court stated:

12 But I view the string [on the Sword of Damocles] has been severed.
 13 And so I will decide what, if anything, to award as of this point in
 time independent of what comes up next. It's no longer intended as
 14 essentially a civil coercion to get him there. If he doesn't get there,
 having already had evidentiary sanctions imposed, then, you know,
 15 we'll find something else that maybe works.³⁸

16 A month later, when the Bankruptcy Court imposed monetary sanctions, it explicitly
 17 warned that terminating sanctions would be forthcoming if Lopez did not comply with the Order
 18 and pay the Monetary Sanctions:

19 Well, I've been over it multiple times, and I do think it's time. I
 20 have to say that I'm — you know, as troubled as I've been all along
 in this case and my distress has grown over the intervening period of
 21 time, in reviewing Mr. Lopez's opposition to this particular motion
 and particularly his explanation of the business leading up to
 22 September 11th [the date noticed for his deposition], really, really
 troubles me, frankly. . . And [Lopez] should be made very aware,
 23 Mr. Hayes, that if he fails to pay that total sum [of monetary
 sanctions] within thirty days of today's date — and that's today's
 date, not the date of entry of the order — within thirty days of
 24 today's date, I will consider a terminating sanction motion to strike
 his opposition to the Petition. And we'll take it from there.³⁹

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 26³⁷ ASA Tab 168, Reporters Transcript (03/12/07), p. 0598 - 0599.

27³⁸ ASA Tab 169, Reporters Transcript (10/01/07), p. 0607.

28³⁹ ASA Tab 119, Reporters Transcript (11/19/07), p. 0385 - 0387.

1 Despite the Bankruptcy Court's Order, and its explicit warning of impending terminating
2 sanctions, no portion of the Monetary Sanctions has been paid.

3 Ultimately, the Bankruptcy Court determined that neither evidentiary nor monetary
4 sanctions were sufficient to deter Lopez, and that terminating sanctions were necessary and
5 appropriate:

If I were to require Mr. Keehn to [go] ahead and do his Motion for Summary Judgment on the second issue, it would be just as if Mr. Lopez could continue to ignore this Court's orders. I let you know back in November that I'd [had] it in terms of his non-participation in this process; foot-dragging and non-participation. And I remain in that frame of mind. So the Order for Relief will enter.⁴⁰

The Ninth Circuit agrees that “[i]t is appropriate to reject lesser sanctions where the court anticipates continued deceptive misconduct.”⁴¹ Lopez’s past disobedience was particularly troubling because it demonstrated that — beyond his willingness to disobey court mandates — he is impervious to the threat of monetary sanctions. He just refuses to pay them. So, what the fulness of time was able to demonstrate to the Bankruptcy Court is that neither the threat, nor the actual imposition of monetary sanctions, has any real impact on Lopez. Given this demonstration that Lopez will neither play by the rules, nor obey the Bankruptcy Court’s mandates, it was appropriate for the Bankruptcy Court to truncate his continuing ability to dilute the value of the process to his pre-petition creditors, and demean the integrity of the Court, by imposing the one sanction that can not be ignored — the terminating sanction that puts a trustee in control, and caps the universe of priority Involuntary Gap Claims.⁴² The Bankruptcy Court properly exercised its discretion in issuing the Terminating Sanction, and the Order should be affirmed.

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⁴⁰ ASA Tab 133, Reporters Transcript (01/28/08), p. 0541.

⁴¹ *Anheuser-Busch, Inc. v. Natural Beverage Distrib.,* 69 F.3d 337, 352 (9th Cir. 1995).

⁴² Claims arising after the Petition date, and before entry of an Order for Relief.

VII. CONCLUSION

2 “Nothing emboldens sin so much as mercy.”⁴³ In a stunning example of *life imitating art*,
3 Lopez’s conduct in this case offers empirical proof of that literary postulate. For a year, he
4 successfully employed passive-aggressive tactics to hinder, delay, emotionally frustrate, and
5 financially drain his opponents in a campaign to eviscerate the economic utility of the involuntary
6 Petition. Along the way, he encountered the Bankruptcy Court’s profound patience, and almost
7 unending willingness to give him mercy in the form of second chances and deferred sanctions to
8 coax him into doing what he is obligated to do as a litigant. It was only after Lopez had clearly
9 eschewed every reasonable opportunity to recant, that the Bankruptcy Court exercised its last
10 available sanction.

The Bankruptcy Court's findings were supported by substantial evidence, and were not clearly erroneous. The Bankruptcy Court did not abuse its discretion in striking Lopez's Answer, and its Order should be affirmed.

Date: August 8, 2008

KEEHN & ASSOCIATES
A Professional Corporation

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L. Scott Keehn
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⁴³ William Shakespeare, *Timon of Athens*, Act III, Scene iii.